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THE VICEROY ON THE HIGH COURTS AND THE PRESS ACT.

The independence of the Judiciary is the foundation for "the rule of law" which obtains in every country to which the English jurisprudence has been extended, and is the only guarantee for individual freedom and rights of property. Whether it be proper or not, for a Judge to condemn the policy of an enactment or to pass "a censure" upon the Legislature, there can be no doubt that an attack upon the judiciary by the executive is inconsistent with the essential principles of the British Constitution and is fraught with great danger to society as it is sure to undermine and sap judicial independence. Such an attack is all the more objectionable, as the subject of the attack is not in a position to defend himself, being prevented by the long established and well understood traditions of his office from entering the arena of political controversy.

In the columns of a Journal such as this we have nothing to do with the wisdom of the action taken by the Executive under the Press Legislation. But we feel that we shall be failing in our duty if we do not take exception to certain statements in the reply made by His Excellency the Viceroy on the 5th March 1917 to the Press Deputation, as the viceregal utterance in certain parts of it is in direct violation of the principle of the immunity of the judiciary from all forms of attack by the executive. Not only are the criticisms of the Viceroy improper from the constitutional point of view but they seem to be also unjustifiable in the circumstances of the case.

In the first place, referring to the dicta of the two Indian Judges in regard to the character of the press legislation, the Viceroy begins by stating that it is not the function of a Judge to say what the law ought to be but to decide what it is; and lower down in the reply His Excellency proceeds to point out that the Officiating Chief Justice of Madras would have hesitated before describing the keeping of printing presses as "an

extremely hazardous undertaking" if only the Chief Justice had before him the statistics which His Excellency placed before the Deputation. His Excellency winds up by saying that the pronouncement as to the Press Act being an encroachment on the freedom of the Press is a "pronouncement appropriate enough to the Council Chamber."

It is no doubt true and no reminder is needed that it is the function of a Judge to decide only what the law of the land is and that the judiciary is not in any sense a court of appeal from the Legislature. But at the same time it is quite consistent with the highest judicial tradition in England for Judges to offer judicial criticisms on the law of the land and it is a historical fact that legislation has been moulded to some extent by judicial criticism of existing enactments. We find Judges offering criticisms on the wording of enactments in very strong terms though technically the Judges of the land as trained experts are only to interpret the enactments even though they be confused and unintelligible. Lord Fitzgerald described an Act of Parliament as the result of malicious ingenuity. Lord Macnaghten spoke of the Finance Act of 1904 as strangely expressed and singularly ill-drawn.

But even apart from that we are aware of no rule of judicial etiquette that precludes a judge from stating the *nature or effect* of a particular piece of legislation. Judges have also criticised the methods pursued by the Legislature during the passing of an enactment. Says Mr. Justice Mathew in L. R. 26 Q. B. D. at 195 :—" The difficulty has arisen not from anything inherent in the object itself, which is simple enough, and might be quite simply treated, but from the mode of legislation now usual in these matters." And not infrequently do we find Judges denouncing in strong terms enactments which infringe the liberty of the subject. A purely lawyer Judge like Lord Watson did not feel that he was travelling beyond his province as a Judge when he characterised a proclamation of the Governor of Cape Colony "as autocratic Legislation" "little calculated to enhance the repute of British Justice" even on the basis that such legislation was *intra vires*, *Sprigg* v. *Sigcau* [1]. Nor did a great Judge like Lord Macnaghten whose passion for Justice was well known think it-

1. L. R. 1897 A. C. at 247.

out of place to remark that an enactment passed by the Provincial legislature of Manitoba was " extremely stringent, more stringent probably than anything that is to be found in any legislation of a similar kind" though he came to the conclusion that the legislation was *intra vires*.

We cannot appreciate the reasoning of the Viceroy when he says that the Chief Justice of Madras would have hesitated to characterise the keeping of printing presses under the Press Act as a hazardous undertaking if the Chief Justice had the statistics before him. The accident that under a particular administration, the Act may be worked well or ill can have no bearing on the effect of the enactment. The hazardousness consists in the working of the Act being dependent upon the idiosyncrasies of individual administrators and in the uncertainty that the subject feels as to the law he is to obey. The reference to the Council Chamber in His Excellency's criticism is extremely inappropriate and should have been avoided even if it was in response to some statement made by the deputation.

Not content with dilating upon the functions of Judges in the matter of Statutory interpretation, His Excellency indulges in criticism bordering on censure, when he says that "the Chief Justice of Madras in giving a testimonial to Mrs. Besant of her *bona fides* and loyalty was dealing with an issue which was not only not before him but with regard to which he had not the materials to formulate a decision." Under S. 20 of the Press Act, in considering the effect or tendency of any particular article alleged to be the basis of the forfeiture, the court is entitled to look at other articles in aid of the proof of the nature or tendency of the article in question. In the particular case before their Lordships the Crown relied on certain articles and the petitioner on certain other articles and these articles were discussed before the learned Judges. The petitioner addressed an argument that the court is bound to look at the general policy of the paper and should have regard to the various expressions and manifestations of loyalty apparent in the various articles published from time to time. The Advocate General contended that the general intention was immaterial and that the other articles were only a guide to the interpretation of the particular articles in question. In these circumstances it cannot be said that the learned Chief Justice was dealing with an issue which was not before him or purported "to formulate" a

decision without having the necessary materials before him for such a decision, when he made the remark that "the articles placed before him did not lead him to doubt in any degree the sincerity of her protestation" or when he acquitted Mrs. Besant "of any wilful attempt to disseminate disaffection or hatred against the Government of the Country or to create feelings of hatred against any class of His Majesty's subjects." As observed by Lord Mac naghten, "What has the Court to do with the Executive? Why should the Executive Government take upon itself to instruct the Court in the discharge of its proper function?" *Wallis* v. *Solicitor-General of New Zealand* [1].

Referring to the view of the majority of the learned Judges that the act of the magistrate in cancelling a previous order relating to the security furnished by Mrs. Besant was *ultra vires*, His Excellency remarks that the Press deputation "omitted to notice that the learned Judges were not on agreement on the point and that as the learned Judges had admittedly no jurisdiction in the matter, their remarks were in the nature of *obiter dicta*." We cannot but express our surprise and disappointment at this statement of His Excellency. Having regard to the opinion of the Majority of the Judges, we should have thought that it was the duty of the Viceroy to express his regret for the ultra vires Act of the Magistrate and to have assured the Press Deputation that there would be no recurrence of such acts. His Excellency must have been aware quite as well as we are that "It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, it is the duty of the Executive in cases of doubt to ascertain the law in order to obey it, not to disregard it. The non-existence of any right to bring even the Crown into Court does not give the Crown immunity from all law or authorise the interference by the Crown with private rights of its own free will." L. R. 1915 A. C. 750.

As regards the disagreement among the Judges on the question as to whether the order of cancellation of the Magistrate was *ultra vires*, though there is no reference in His Excellency's reply to the fact that the Judgment is that of the majority of the Judges, His Excellency must doubtless have been aware that the Judgment of the Court is that of the majority, We are unable to

1. (1903) A. C. at 188.

appreciate the remark that because it was held that the petitioner was remediless in the particular proceeding before their Lordships, their observations with regard to the legality of the order of the Magistrate are in the nature of *obiter dicta.* The legality or otherwise of the order and the jurisdiction of the Court to redress the illegality in the particular proceeding, were strenuously argued both by the Counsel for the petitioner and the counsel for the Crown. Assuming that the Court had the jurisdiction to grant a remedy, it was necessary for the Court to decide whether the order was legal or not. There was every chance of the matter going up before another tribunal; the question itself was one of great public importance. It was therefore not only the right but the duty of the Court under the circumstances to have expressed an opinion on the legality of the act of the Executive. In a recent case before the Judicial Committee in an appeal from New South Wales the question arose, whether a particular appropriation of waste lands by the Government was authorised or not. The action was laid by a private person without the consent of the Attorney-General. The Judicial Committee came to the conclusion that the action ought to be dismissed on that ground. But at the same time their Lordships thought it better " not to dispose of a case which has attracted some public concern on that formal ground." And their Lordships proceeded to discuss the legality of the act.

Again, in the decision reported in L. R. 1894 A. C., page 347, the House of Lords came to the conclusion that certain proceedings were not properly laid under the Patents, Designs and Trade Marks Act. And yet the Lord Chancellor of the day, Lord Herschell, proceeded elaborately to discuss the question whether certain rules passed by the Board of Trade were *ultra vires* of them or not, though the expression of any opinion on the matter was unnecessary for the disposal of that case. We do not think it necessary to multiply instances to show that even in ordinary cases between a subject and a subject the Judicial Committee very often express their opinion on points argued at the bar.

We would not have entered on this criticism of His Excellency's reply to the Press Deputation but for the fact that there has been growing of late a regrettable tendency on the part of the Executive to treat the Judiciary with scant respect. Some years ago we

drew attention in the pages of this Journal to the very undignified way in which during the debates on the Land Encroachment Bill, the then acting Governor of Madras referred to "the mania abroad as to the value of and respect to be paid to the judgments of the High Court". And our criticism of the Viceroy's speech is none too strong when we remember that that utterance had the effect of calling forth the following homily in a Calcutta newspaper. "The only thing for a Government which finds its best intentions nullified by the superintelligence of law courts is to re-enact what it promises in clear language sufficient for the most muddle-headed High Court to understand."

We would close our remarks with the hope that the Executive in this country would act with due regard to the following observations of Lord Alverstone, "It was a great thing that the subjects of His Majesty should feel that their interests would be protected by an impartial construction being given to Acts Parliament...... ....he trusted that His Majesty's judges would always be regarded as the impartial tribunal to whom was to be given the duty of interpreting Acts of Parliament..... and he hoped that the time would never come when it would be considered that the Executive Government was to be its own interpreter of Acts of Parliament." It only remains to add that no rule of mutuality applies to the relations between the Executive and the Judiciary; for, while criticism and control of the Executive by the Courts is the very basis of the "Rule of law" which as Professor Dicey demonstrates is the characteristic feature of the British constitution, the converse, *viz.*, criticism of the Judiciary by the Executive is opposed to and utterly subversive of it.